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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 THE GUY MITCHELL & BETTY J.  
8 MITCHELL FAMILY TRUST,

9 Plaintiff,

10 v.

11 ARTISTS RIGHTS ENFORCEMENT  
12 CORPORATION, a New York  
13 Corporation,

Defendant.

NO: 11-CV-0024-TOR

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
AND CROSS COMPLAINANT'S  
MOTION FOR SUMMARY  
JUDGMENT

14 BEFORE THE COURT is Defendant and Cross Complainant's Motion for  
15 Summary Judgment (ECF No. 118). This matter was heard without oral argument  
16 on February 21, 2013. The Court has reviewed the relevant pleadings and  
17 supporting materials, and is fully informed.

18 BACKGROUND

19 This action arises from a contract dispute regarding the distribution of  
20 royalty payments. Plaintiff, The Guy Mitchell and Betty J. Mitchell Family Trust

1 (“Trust”) seeks injunctive relief, declaratory judgment, and damages for alleged  
2 breach of fiduciary duty, common law fraud, negligent misrepresentation,  
3 conversion, accounting, and breach of contract. ECF No. 7. Defendant, Artists  
4 Rights Enforcement Corporation (“AREC”), counterclaimed for injunctive relief,  
5 declaratory judgment, and damages for alleged breach of contract and *quantum  
meruit*. ECF No. 27. Presently before the Court is Defendant’s Motion for  
6 Summary Judgment requesting that the Trust’s Complaint be dismissed and  
7 judgment entered in favor of AREC on its cross-complaint.  
8

## FACTS

10 AREC represents recording artists, songwriters, and small music publishers  
11 in negotiations with record companies and music publishers over royalty disputes.  
12 See Defendant and Cross-Complainant’s Local Rule 56.1(b) Statement of  
13 Undisputed Material Facts, ECF No. 120 (“Def. SOF”) at ¶ 1. The Trust is the  
14 successor-in-interest to recording artist Guy Mitchell, whose heirs are still paid  
15 semi-annual royalty payments by Sony Music, Inc. and/or its predecessor-in-  
16 interest (“Sony”) from the sales of recordings that bear his vocal performances.  
17 The Trust has received two types of royalties from Sony: (1) regular royalties  
18 received semi-annually, and (2) previously unreported or underreported royalties  
19 from audits of the Guy Mitchell account with Sony. Stanzak Decl., ECF No. 130  
20 at ¶ 2. According to the Trust, from 1991 through June 2005 the regular semi-

1 annual royalties totaled an average of \$14,000 annually, but decreased sharply after  
2 AREC became involved in 2005. *Id.* at ¶¶ 2, 12.

3       The firm Webman & Associates (“Webman”) was hired in 1995, 2000, and  
4 2004 to perform audits of the royalty payments to determine if the Trust had been  
5 underpaid in prior royalty payments rendered, for which it was contracted to  
6 receive thirty percent (30%) of any additional payments Webman recovered over  
7 and above the regular semi-annual income. In its 2000 audit, Webman identified  
8 almost \$30,000 in monies owing to the Trust, and negotiated new terms to the  
9 Plaintiff’s recording contracts. The parties dispute whether the “new terms”  
10 negotiated by Webman were favorable to the Trust.<sup>1</sup>

11       In 2004, Webman negotiated another settlement whereby the Trust would  
12 receive a lump sum payment of approximately \$70,000 less Webman’s 30% fee.  
13 After a series of phone calls between AREC and the Trust, the Trust declined to  
14 accept the \$70,000 settlement offer. Although disputed by AREC, the Trust  
15 contends that the president of AREC Chuck Rubin (“Rubin”) “persuaded” the

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17 <sup>1</sup> According to AREC, the terms of the 2000 settlement included agreements to  
18 calculate royalties based on the lower “price published to dealers” and change the  
19 packaging discount to an amount in excess of what was included in the Mitchell  
20 Recording Agreement. Def. SOF at ¶¶ 19-21.

1 Trust to switch from Webman to AREC by promising to recover millions of dollars  
2 in unpaid royalties and quadrupling the amount of regular royalties. Stanzak Decl.,  
3 ECF No. 130 at ¶¶ 7, 11. In contrast, AREC recalls that Stanzak and Mrs. Mitchell  
4 retained AREC to represent the Trust because they were concerned about royalties  
5 being withheld and losing more favorable contractual terms (as allegedly happened  
6 in the 2000 audit). Def. SOF at ¶¶ 24, 26-27. AREC also maintains that it told  
7 Mrs. Mitchell the contingent fee in the Agreement would need to include a  
8 guaranteed share of future royalties (25%), because there was no expectation of a  
9 substantial recovery in a lawsuit against Sony. *Id.* at ¶ 35. However, the Trust  
10 insists that it never agreed to pay any portion of royalties other than for increases  
11 obtained as a result of AREC's activities. ECF No. 130 at ¶ 9.

12 On June 13, 2005, Mrs. Mitchell, on behalf of the Trust, and Rubin, on  
13 behalf of AREC, signed an agreement ("Agreement") under which the Trust  
14 retained AREC to act on behalf of the Trust "in connection with the investigation  
15 into and collection and/or recovery of any and all royalties and/or other assets  
16 which are or may be due and owing to GUY MITCHELL as a CBS recording  
17 artist." ECF No. 121-5. AREC agreed to use their "best efforts to obtain from  
18 music companies and all others who are or may be liable to THE FAMILY  
19 TRUST ... an accounting for and collection of such royalties and other rights  
20 which are or may be due ..." *Id.* The Agreement indicated that AREC would

1 engage counsel and initiate litigation on behalf of the Trust. *Id.* In relevant part,  
 2 the Agreement also provided that

3 [i]n return for your services rendered hereunder, you shall be initially  
 4 entitled to an on-going twenty-five (25%) percent of all sums and assets  
 5 which are received from Sony BMG Music Entertainment (successor-in-  
 6 interest to Columbia Records, CBS Records and Sony Music) beginning  
 7 with any special payments made after June 30, 2005 and specifically with  
 8 the period ending December 31, 2005. However, in return for your services  
 9 rendered hereunder and as a proximate result of your activities pursuant to  
 10 this agreement, if you are successful through either negotiation or litigation  
 11 in generating income that is in excess of the amount THE FAMILY TRUST  
 12 would have received but for your involvement, you shall then be entitled to  
 13 an on-going fifty (50%) percent of such sums and assets. I further agree that  
 14 all out-of-pocket expenses (including fees to additional local counsel)  
 15 incurred by you in connection with the handling of THE FAMILY TRUST's  
 16 claim(s) shall be reimbursed and deducted "off the top" from the amounts  
 17 recovered before the division of our respective shares.

18 *Id.*<sup>2</sup> Finally, the Trust authorized AREC to request documents from Sony  
 19 regarding royalty payments, and to collect and receive all royalties on behalf of the  
 20 Trust. ECF No. 121-6.

21 AREC started receiving royalty payments on behalf of the Trust beginning  
 22 with the period ending December 31, 2005. According to AREC, it agreed to defer  
 23 its 25% fee from this period through June of 2008 after Stanzak explained that his  
 24 mother Mrs. Mitchell was in ill health and needed the money, and continued to

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25 <sup>2</sup> The Court notes that the Agreement does not address the propriety of verbal  
 26 modifications to the Agreement, nor does it indicate that any such oral  
 27 modifications must be made in writing.

1 defer its fee for the subsequent semi-annual reporting periods through June 2008.

2 Def. SOF at ¶¶ 46-49. The Trust contends that it never discussed deferred fees,

3 and never received any oral or written suggestion from Rubin that AREC was

4 entitled to 25% of the Trust's regular royalties. ECF No. 130 at ¶ 18-19.

5 Pursuant to the Agreement, a lawsuit was brought against Sony and

6 Webman in 2005. In early 2009, the lawsuit against Sony was settled for a one-

7 time payment,<sup>3</sup> and did not include any changes or modifications to the calculation

8 of royalty payments going forward. Def. SOF at ¶¶ 56-57. The Trust received a

9 large portion of the one-time payment for previously unpaid royalties, with a

10 considerably smaller portion of the payment retained by AREC.<sup>4</sup> Subsequently,

11 AREC withheld 25% from the regular semi-annual royalty payment sent in

12 February 2009, allegedly to "make up for past deferments." *Id.* at ¶ 55; ECF No.

13 130 at ¶ 20. Under similarly disputed circumstances, AREC then withheld 50%

14 from the semi-annual August 2009 payment. At this point, the parties discussed

15 identifying a threshold royalty amount to calculate when AREC was entitled to its

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16 <sup>3</sup> Pursuant to the confidentiality agreement entered between AREC and Sony, the

17 Court will not refer to the exact amount provided for in the settlement.

18 <sup>4</sup> Again, the parties dispute whether AREC was owed 50% of the one-time

19 settlement payment under the terms of the Agreement and whether any verbal

20 agreement was made to defer those fees. *See* ECF No. 129 at ¶¶ 52-53, 59.

1 50% fee on any increase in royalties it proximately caused. AREC contends the  
2 agreed upon base was \$6,000 annually, while the Trust maintains the base was  
3 \$12,000 annually. ECF No. 129 at ¶¶ 63-65. In February of 2010, AREC sent a  
4 letter to the Trust indicating that the royalties for that period totaled \$357.40, and  
5 noted that no AREC fee was deducted. ECF No. 130-5 at 36. At some point after  
6 this letter was sent, the Trust contacted Sony and directed that all further royalty  
7 payments be sent directly to the Trust.

8 DISCUSSION

9 **A. Standard of Review**

10 The Court may grant summary judgment in favor of a moving party who  
11 demonstrates “that there is no genuine dispute as to any material fact and that the  
12 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). In ruling  
13 on a motion for summary judgment, the Court must only consider admissible  
14 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9<sup>th</sup> Cir. 2002). The  
15 party moving for summary judgment bears the initial burden of showing the  
16 absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.  
17 317, 323 (1986). The burden then shifts to the non-moving party to identify  
18 specific facts showing there is a genuine issue of material fact. *See Anderson v.*  
19 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla

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1 of evidence in support of the plaintiff's position will be insufficient; there must be  
2 evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

3 For purposes of summary judgment, a fact is "material" if it might affect the  
4 outcome of the suit under the governing law. *Id.* at 248. Further, a material fact is  
5 "genuine" only where the evidence is such that a reasonable jury could find in  
6 favor of the non-moving party. *Id.* The Court views the facts, and all rational  
7 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*  
8 *Harris*, 550 U.S. 372, 378 (2007).

9 **B. AREC's Contract Counterclaim**

10       1. Applicable Law

11       The Agreement does not include a choice of law provision. AREC argues  
12 that New York law should apply, while the Trust contends that Washington law  
13 governs. Federal courts sitting in diversity "must look to the forum state's choice  
14 of law rules to determine the controlling substantive law." *Patton v. Cox*, 276 F.3d  
15 493, 495 (9th Cir. 2002). Under Washington law, deciding applicable state law is  
16 a two-part inquiry. "Before a court will conduct a conflict of law analysis, the  
17 party seeking to apply foreign law must show that an actual conflict exists between  
18 the presumptive Washington law and the law of the foreign state." *Alaska Nat. Ins.*  
19 *Co. v. Bryan*, 125 Wash. App. 24, 30 (Ct. App. 2004); *see also Burnside v.*  
20 *Simpson Paper Co.*, 123 Wash.2d 93, 100 (1994). If the state's laws do not

1 conflict, presumptive local law is applied. *Seizer v. Sessions*, 132 Wash.2d 642,  
2 648-49 (1997). Conversely, if there is an actual conflict, the applicable law is  
3 determined by which state has the “most significant relationship” to the specific  
4 issue. *Williams v. State*, 76 Wash. App. 237, 241 (1994).

5 Here AREC fails to uphold its burden, as the party seeking to apply foreign  
6 law, to show that an actual conflict exists between New York and Washington law.  
7 The Trust highlights this omission, and argues that there is no actual conflict  
8 between the laws of these two states on the elements a plaintiff must prove in a  
9 breach of contract action. *Compare Lehrer v. State, Dept. of Social and Health*  
10 *Servs.*, 101 Wash. App. 509, 516 (Ct. App. 2000)(“[g]enerally, a plaintiff in a  
11 contract must prove a valid contract between the parties, breach, and resulting  
12 damage.”), and *Willener v. Sweeting*, 107 Wash.2d 388, 394 (1986)(“[i]f a contract  
13 requires performance by both parties, the party claiming nonperformance of the  
14 other must establish as a matter of fact the party’s own performance.”), with  
15 *Kramer v. Lockwood Pension Services, Inc.*, 653 F. Supp. 2d 354, 386 (S.D.N.Y.  
16 2009)(citing *Terwilliger v. Terwilliger*, 206 F.3d 240, 245-46 (2nd Cir. 2000)) (“it  
17 is well-settled under New York law that to establish a claim of breach of contract,  
18 a plaintiff must prove the following elements: (1) the existence of a contract; (2)  
19 plaintiff’s performance of the contract; (3) defendant’s breach of the contract; and  
20 (4) damages suffered as a result of the breach.”). Again, AREC offers no argument

1 or supporting case law to indicate an actual conflict between Washington and New  
 2 York law. Thus, the Court will apply Washington law to the Defendant's counter  
 3 claim for breach of contract.

4 Washington follows the "objective manifestation" theory of contracts, under  
 5 which "we attempt to determine the parties' intent by focusing on the objective  
 6 manifestations of the agreement, rather than on the unexpressed subjective intent  
 7 of the parties." *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash.2d 493,  
 8 503-04 (2005)(generally give words in contract their ordinary, usual, and popular  
 9 meaning unless the entirety of the contract demonstrates a contrary intent).  
 10 Moreover, in order to ascertain the parties' intent, extrinsic evidence is admissible  
 11 as to the entire circumstances under which the contract was made. *Berg v.*  
 12 *Hudesman*, 115 Wash.2d 657, 667 (1990).

13 As an initial matter, the parties do not appear to dispute the existence of a  
 14 contract. Further, while each party summarily contends that the Agreement at  
 15 issue is either ambiguous (the Trust) or unambiguous (AREC), neither party  
 16 provides any further argument or legal support as to why or how the terms of the  
 17 Agreement are ambiguous.<sup>5</sup> For instance, the Trust offers no argument that any

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18 <sup>5</sup> AREC does include a footnote anticipating an ambiguity assertion by the Trust,  
 19 and cursorily argues that under New York law extrinsic evidence cannot be  
 20 considered until the Court determines the contract is ambiguous. ECF No. 119 at

1 specific terms in the Agreement are, or are not, uncertain or capable of being  
2 understood to have more than one meaning. *See Mayer v. Pierce County Med.*  
3 *Bureau, Inc.*, 80 Wash. App. 416, 421 (Ct. App. 1995)(a provision is not  
4 ambiguous simply because the parties suggest opposing meanings). Rather, the  
5 Trust repeatedly argues only that it never agreed to AREC retaining any portion of  
6 the Trust's regular royalty income when negotiating the terms of the Agreement.  
7 ECF No. 128 at 6. While these factual assertions may implicate issues regarding  
8 the formation of the Agreement, the Court declines to address hypothetical  
9 arguments not properly developed by the parties as to the any alleged ambiguity of  
10 the contract.

11 Thus, the question remaining for the Court is whether AREC successfully  
12 establishes no genuine issues of material fact exist as to the remaining three  
13 elements on its breach of contract claim.

14 2. Performance by AREC

15 Whether AREC fully performed its obligations under the Agreement is an  
16 issue of fact. *Reynolds Metals Co. v. Electric Smith Const. & Equip. Co.*, 4 Wash.  
17 App. 695, 698 (Ct. App. 1971). Under the express terms of the Agreement, AREC  
18 was retained to investigate and collect royalties and/or other assets due to the  
19 10 n. 2. However, as the Court has determined that Washington law applies, this  
20 argument is inapposite.

1 Trust, and use its “best efforts” to obtain “an accounting for and collection of such  
2 royalties and other rights” due to the Trust. ECF No. 121-5. According to AREC,  
3 it successfully ensured that Sony remitted payment for all royalty amounts  
4 outstanding to the Trust after the 2004 audit, and resisted making additional royalty  
5 rate concessions during the negotiating process that would further reduce royalty  
6 payments. ECF No. 120 at ¶¶ 27-30.

7 The Trust does not dispute that AREC successfully negotiated a settlement  
8 with Sony for some royalty payments outstanding through the period ending in  
9 June of 2008. ECF No. 129 at ¶ 56. However, the Trust notes that this amount did  
10 not include *regular* semi-annual royalties, and argues that AREC did fulfill its  
11 contractual obligation to conduct an accounting regarding the actual tracking and  
12 calculation of royalties. Thus, the Trust contends that the actual figures used  
13 during the settlement negotiations underestimated amounts due to the Trust, and  
14 disputes AREC’s assertion that it obtained the full amount of monies due to the  
15 Trust through June of 2008. Additionally, the Trust disputes that AREC  
16 successfully resisted Sony’s demands to make additional adverse modifications,  
17 and that AREC “saved” it from paying \$20,000 to Webman for the 2004 audit.<sup>6</sup>

18 <sup>6</sup> The Trust also maintains AREC did not perform under the Agreement because a  
19 triable issue of fact was identified in the Court’s previous ruling regarding whether  
20 AREC was lawfully entitled to keep 50% of the August 2009 regular royalty

1       Although AREC contends it was not required to execute an audit settlement  
2 to obtain the monies identified in the 2004 audit, the Court finds a genuine issue of  
3 fact remains as to whether AREC performed its obligation to conduct the  
4 “accounting” expressly required under the terms of the Agreement. *See* ECF No.  
5 121-5. AREC does not address this portion of the Agreement, much less uphold its  
6 burden on summary judgment to show no genuine issue of material fact exists as to  
7 whether this “accounting” was performed. It is undisputed that AREC obtained  
8 some portion of royalties owed to the Trust, however, the Court finds triable issues  
9 of fact remain as to whether AREC obtained the full amount of monies due under  
10 the Mitchell Recording Contracts through June 2008 by using its “best efforts” to  
11 obtain “*an accounting for* and collection of such royalties and other rights.” *See*  
12 *id.* (emphasis added) Further, the Court finds AREC fails to show no genuine  
13 issue of fact exists as to whether it resisted demands from Sony that the Trust make  
14 adverse modifications to the calculation of its royalty payments as a part of the  
15 settlement negotiation. Aside from Rubin’s general declaration that AREC  
16 successfully opposed modifications, AREC provides no evidence of the precise  
17 adverse changes that would have transpired as a result of the 2004 audit by  
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19 payment. ECF No. 128 at 15. The Court finds it unnecessary to address its  
20 previous finding in light of the triable issues of fact identified below.

1 Webman, had AREC not taken over the negotiations, or the extent to which those  
2 modifications would have decreased future royalty payments.

3 As to AREC's final assertion that it performed its duties under the  
4 Agreement by "saving" the Trust the \$20,000 it would have paid Webman for the  
5 2004 audit, the Court finds no portion of the Agreement addressing any duty  
6 imposed on AREC to save the Trust money in the course of its business dealings  
7 with Webman or any other company. Rather, AREC was charged solely with  
8 collecting royalties and other assets due to the Trust. While this alleged \$20,000  
9 "savings" might have been a fortunate side effect of AREC taking over the  
10 negotiations, it is irrelevant to evaluating AREC's performance under the  
11 Agreement. For all of these reasons, in the light most favorable to the Trust, the  
12 Court finds that whether AREC fully performed its obligations under the  
13 Agreement is a matter to be decided by the trier of fact.<sup>7</sup>

14 **C. The Trust's Fraud Claims**

15 For the purposes of this motion, the parties agree that Washington law  
16 applies to the Trust's fraud claims. Under Washington law, the nine elements of a  
17 common law fraud claim must be established by clear, cogent and convincing  
18 evidence, including: (1) a representation of an existing fact; (2) its materiality; (3)

19 <sup>7</sup>In light of this holding, it is unnecessary for the Court to address the final two  
20 elements of AREC's breach of contract counterclaim.

1 its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his  
2 intent that it should be acted on by the person to whom it was made; (6) ignorance  
3 of its falsity on the part of the person to whom it is made; (7) the latter's reliance  
4 on the truth of the representation; (8) his right to rely upon it; and (9) his  
5 consequent damage. *Turner v. Enders*, 15 Wash. App. 875, 878 (Ct. App. 1976).  
6 AREC limited its argument to four elements it contends the Trust cannot prove.

7       1. AREC's Knowledge of Falsity

8           Defendant AREC argues that Plaintiff cannot sustain its burden to show by  
9 clear, cogent and convincing evidence that Rubin's alleged statement that the Trust  
10 was owed "millions" by Sony in unpaid or underreported royalties was made with  
11 knowing falsity. AREC contends that these alleged statements were made prior to  
12 the execution of the Agreement and the authorization for AREC to access Sony's  
13 accounting records. Thus Rubin could not have known the actual amount of  
14 underreporting and could not have made a false statement of fact.

15           Washington courts have held that "a person cannot defeat recovery by a  
16 showing that he did not know his representations were false or that he believed  
17 them to be true, if he made them recklessly and carelessly without knowing for  
18 certain whether they were true or false." *Swanson v. Solomon*, 50 Wash.2d 825,  
19 828 (1957). As indicated by the Trust, Rubin testified as to his many years  
20 representing recording artists in negotiations with record companies and music

1 companies over royalty disputes, and now contends that royalties for artists in Guy  
2 Mitchell's era decreases over time as the artists' popularity wanes. Rubin Decl.,  
3 ECF No. 121 at ¶¶ 3, 5. Moreover, Rubin allegedly stated that the Trust was owed  
4 millions of dollars "based upon his initial investigation." ECF No. 7 at ¶ 26. The  
5 Court finds genuine issues of fact remain as to the extent of knowledge gained by  
6 AREC as a result of this alleged investigation, and whether Rubin's alleged  
7 statements were made carelessly or recklessly without knowing for certain whether  
8 they were true or false.

9       2. Ignorance of Falsity on the Part of the Trust

10       AREC argues only that Mrs. Mitchell was not ignorant of the true amount of  
11 royalties owing to the Trust because at the time Mrs. Mitchell retained AREC,  
12 because she knew that the written audit report from Webman indicated Sony owed  
13 the Trust approximately \$70,000. The Court finds this knowledge is not sufficient  
14 to show no genuine issue of material fact as to whether the Trust was ignorant to  
15 the falsity of alleged statements made by Rubin that as soon as Sony found out the  
16 Trust was represented by AREC, the amount of semi-annual payments would  
17 quadruple and AREC could potentially recover millions of dollars in unpaid  
18 royalties. The fact that the most current audit revealed only \$70,000 dollars owed  
19 to the Trust does not entirely foreclose Mrs. Mitchell's alleged ignorance to the  
20

1 falsity of the statement that AREC could uncover a substantial amount of money in  
2 excess of the \$70,000 reported by Webman.

3       3. The Trust's Reliance on the Truth of the Representation

4       Under Washington law, a fraud plaintiff must prove that he justifiably relied  
5 on the defendant's misrepresentations. *See Stiley v. Block*, 130 Wash.2d 486, 505  
6 (1996); *see also Swartz v. KPMG LLP*, 476 F.3d 756, 761 (9th Cir. 2007)(applying  
7 Washington law and noting “[w]hether a party justifiably relied upon a  
8 misrepresentation is an issue of fact.”). A party's reliance must be “reasonable  
9 under the surrounding circumstances;” determination of which requires a fact-  
10 intensive analysis of considerations such as plaintiff's education, experience and  
11 relative sophistication, and whether the defendant had special expertise. *Swartz*,  
12 476 F.3d at 762 (citations omitted).

13       AREC argues that the Trust could not reasonably rely on Rubin's alleged  
14 representations that he could quadruple the semi-annual royalties and/or recover  
15 millions in unpaid royalties because: (1) Stanzak represented that the Trust was  
16 receiving \$12,000 a year in artist royalties, (2) past audits by Webman of five year  
17 periods of underpaid royalties never indicated amounts in excess of six figures, and  
18 (3) Rubin told Mrs. Mitchell that it would require a guaranteed 25% fee due to the  
19 small anticipated recovery. ECF No. 119 at 14-15. Moreover, according to  
20 AREC, there is no evidence that Mrs. Mitchell relied upon the alleged

1 representations. The Trust responds that Rubin told Mrs. Mitchell and Stanzak  
2 that “based on his initial investigation,” he discovered that Webman only  
3 renegotiated the royalty rates and deductions from revenue instead of conducting  
4 an audit. ECF No. 7 at ¶¶ 25-26. Rubin also allegedly stated that he had sued  
5 Sony so many times that as soon as Sony found out AREC was involved, the semi-  
6 annual payments would quadruple and the audit would reveal millions in  
7 unreported royalty income. *Id.* at ¶ 29.

8 Here, viewed in the light most favorable to the Trust, the Court finds  
9 genuine issues of fact remain as to whether the Trust justifiably relied on Rubin’s  
10 alleged statements. While the Trust certainly had knowledge of the current state of  
11 royalty payments, AREC offers no evidence that Stanzak or Mrs. Mitchell had  
12 experience or sophistication in negotiating with Sony to recover unpaid royalties or  
13 negotiating new terms on royalty rates or deductions from revenue. Previous  
14 audits of the royalty income were conducted on behalf of the Trust by Webman,  
15 and Mrs. Mitchell contacted AREC for assistance when she questioned the effect  
16 the 2004 settlement offer might have on her future royalty income. It cannot be  
17 disputed that AREC had special expertise in negotiating with record companies  
18 and music companies over royalty disputes. Rubin Decl., ECF No. 121 at ¶ 3.  
19 Thus, the Court finds a determination of whether the Trust justifiably relied on  
20 Rubin’s alleged representations is best left to the trier of fact.

1           4. Damages

2           Under Washington law, an essential element of a fraud claim is plaintiff's  
3 consequent damage from the fraud. *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207,  
4 1218 (9th Cir. 1983)(“[f]ailure to prove this essential element is fatal to a fraud  
5 claim.”). A plaintiff is entitled to recover damages for losses proximately caused  
6 by the fraudulent conduct. *Buttnick v. Clothier*, 43 Wash.2d 667, 673 (1953).

7 AREC argues the Trust failed to assert any evidence of damages from the alleged  
8 fraud, and offers Stanzak's testimony that he had no evidence that the Trust was  
9 due more money than it received as part of the settlement agreement negotiated by  
10 AREC. ECF No. 122-1 at 77-78. The Trust contends that as a result of its  
11 reasonable reliance on Rubin's representations, it incurred damages, including: (1)  
12 causing the termination of the Trust's relationship with Webman, (2) AREC  
13 wrongfully retaining a portion of royalty payments due to the Trust, and (3) Sony  
14 putting a “hold” on royalties due to the Trust until the conclusion of the instant  
15 litigation. ECF No. 128 at 19.

16           As an initial matter, the Court finds no evidence that the termination of the  
17 Trust's relationship with Webman resulted in any damage to the Trust. The Trust  
18 was not required to pay the 30% fee to Webman for the 2004 audit, and there is no  
19 indication that the Trust was prevented from re-hiring Webman at any time if  
20 they wished to retain their services. Similarly, the “hold” on royalties due to the

1 Trust was solely caused by the instant litigation, not the underlying common law  
2 fraud claim. There is no indication that the Trust will not receive those royalties at  
3 the conclusion of the action presently before the Court. Finally, the Trust argues  
4 that Rubin's statements caused the Trust to authorize AREC to collect royalties,  
5 and AREC subsequently unlawfully retained royalties owed to the Trust.  
6 However, the Court finds no evidence that the alleged fraudulent conduct of Rubin  
7 was the proximate cause of AREC wrongfully withholding a portion of royalties  
8 due to the Trust. Rather, the alleged withholding of these royalties was the result  
9 of the alleged breach of contract claim, pled simultaneously with the common law  
10 fraud claim and currently pending before the Court. At no time does the Trust  
11 claim, or provide evidence showing, that it could be collecting more than it  
12 received as a result of AREC's negotiations with Sony, much less that the millions  
13 of dollars on unpaid royalties or a quadrupling of the semi-annual royalty  
14 payments as allegedly represented by Rubin. The Trust does not sustain its burden  
15 on summary judgment to show a genuine issue of material fact exists as to  
16 damages proximately caused by the fraudulent conduct. Thus, the Court finds as a  
17 matter of law that the Trust cannot prove damages.

18 Moreover, under Washington law, a plaintiff claiming negligent  
19 misrepresentation must prove by clear, cogent and convincing evidence that "false  
20 information proximately caused the plaintiff damages." *Ross v. Kirner*, 162

1 Wash.2d 493, 499 (2007). The Court has already found no genuine issue of fact  
2 exists as to damages proximately caused by any fraudulent conduct or information.  
3 Thus, the negligent misrepresentation claim similarly fails as a matter of law. Due  
4 to the Trust's failure to prove the essential element of damages, summary judgment  
5 is granted to AREC on the common law fraud and negligent misrepresentation  
6 claims.

7 As a final matter, AREC seeks dismissal of the Trust's Complaint in its  
8 entirety. In addition to the common law fraud and negligent misrepresentation  
9 claims dismissed above, the Trust seeks declaratory judgment and injunctive relief,  
10 and asserts claims for breach of fiduciary duties, conversion, accounting, and  
11 breach of contract. ECF No. 7. AREC makes no argument regarding the  
12 conversion claim. Moreover, as to the accounting and breach of contract claims,  
13 AREC argues simply that granting summary judgment on its breach of contract  
14 counter-claim would render these claims moot. ECF No. 119 at 13 n. 4. Not only  
15 is this bold assertion completely unsupported by legal authority, but, as indicated  
16 above, the Court has denied summary judgment on AREC's breach of contract  
17 counter claim. Thus, even assuming the credibility of its *quid pro quo* argument,  
18 AREC is not entitled to summary judgment on the Trust's breach of contract and  
19 accounting claims. Finally, AREC makes the cursory argument that the Trust's  
20 breach of fiduciary duties claim should be dismissed because AREC is not an

1 accounting firm and “the contract does not require (nor does it state) that an audit  
2 be conducted.” ECF No. 119 at 17 n. 6. Again, as indicated above, the Court has  
3 found a genuine issue of material fact as to whether AREC used its “best efforts”  
4 to obtain “an accounting for and collection of such royalties and other rights.” *See*  
5 ECF No. 121-5. Thus, summary judgment is denied on the Trust’s breach of  
6 fiduciary duties claim.

7 **ACCORDINGLY, IT IS HEREBY ORDERED:**

8 Defendant and Cross Complainant’s Motion for Summary Judgment, ECF  
9 No. 118, is **GRANTED** as to Plaintiff’s claims of common law fraud and negligent  
10 misrepresentation against Defendant, and **DENIED** with respect to all other  
11 claims. Summary Judgment on Defendant and Cross Complainant’s breach of  
12 contract claim is **DENIED**.

13 The District Court Executive is hereby directed to enter this Order and  
14 provide copies to counsel.

15 **DATED** March 7, 2013.



16 A handwritten signature in blue ink that reads "Thomas O. Rice".  
17 THOMAS O. RICE  
United States District Judge  
18  
19  
20